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IN THE

# Supreme Court of the United States

October Term, 1962

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**No. 260**

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NORTH CAROLINA NATURAL GAS CORPORATION,
*Petitioner,*

v.

McJUNKIN CORPORATION, *Respondent.*

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## BRIEF FOR McJUNKIN CORPORATION, RESPONDENT, IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

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JOHN H. ANDERSON,
WILLIS SMITH, JR.,
North Carolina Bank Bldg.,
Raleigh, North Carolina.

ARTHUR G. STONE,
DONALD O. BLAIG,
Nelson Building,
Charleston 25, West Virginia,
*Attorneys for Respondent.*

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### INTRODUCTION

On September 15, 1958, McJunkin Corporation, a West Virginia corporation, instituted this action in the United States District Court for the Eastern District of North Carolina, its jurisdiction being invoked on the ground of diversity of citizenship. In October, 1960, the case was tried before Senior District Judge Albert L. Reeves of the Eighth Circuit. The claim was for breach by the Gas Corporation, petitioner herein, of a contract for the purchase of a large quantity of steel pipe. Three questions were involved:

(1) Was there a valid contract of sale?

(2) Was there an unjustified breach by the defendant?

(3) If so, what measure of damages applied?

The trial court answered the first two questions in the affirmative, the defendant having repudiated the purchase

contract without taking any of the pipe, and directed a verdict for the plaintiff in an amount equal to the distributor's profit in the form of a "functional discount" which the plaintiff would have received had petitioner taken and paid for the pipe as agreed.

On appeal the Court of Appeals (Fourth Circuit) affirmed. But on petition of petitioner for a rehearing as to the measure of damages, the Court allowed a rehearing as to that issue. This rehearing resulted in a reaffirmance of the judgment on March 19, 1962.

### Questions as Presented by Petition

The present petition for writ of certiorari was filed on July 17, 1962. It states two questions as grounds for review:

(1) May a federal court in a diversity action measure damages for an anticipatory breach of contract without regard to the state law with respect thereto?

(2) May a federal court in directing a verdict in favor of the party having the burden of proof decline to view the evidence in the light most favorable to the opposite party, and thereby deprive such party of a jury trial?

## ANSWER TO POINT I OF THE PETITION

Point I of the petition charges that the Court of Appeals decided the question of the measure of the plaintiff's damages without regard to the substantive law of North Carolina; this notwithstanding that:

**(1) The measure of Plaintiff's damage, (loss of "functional discount") as found by the District Court and approved by the Court of Appeals, was the only measure of damage supported by competent and relevant testimony.**

**(2) The measure of plaintiff's damage (loss of "functional discount"), as the Court of Appeals so clearly found, was the same whether determined as of the date of the purchase contract, the date of the breach by petitioner,**

**or as of the date plaintiff would have made deliveries had it been permitted to do so promptly after petitioner was in position to receive and pay for the pipe contracted for; and**

**(3) The Court was advised in the briefs as to the Court decisions in North Carolina, and elsewhere, that the measure of damage for the anticipatory breach of a purchase contract, where the time for performance has been postponed indefinitely or is otherwise not fixed, is determined as of the date of the breach; and**

**(4) There is no showing, and there can be no showing, that the decision of the Court was in conflict with the law of North Carolina or of any other state.**

The gist of petitioner's contentions below as to the measure of damages arose out of the fact that effective January 1, 1959, more than seven months after its repudiation of the contract, the basis of compensation to McJunkin was changed by the steel mills from a 5 per cent profit as a distributor on the sales price to a 3 per cent commission as sales agent for the mills, under which plan of course the selling agent was relieved of responsibility for collections. At the date of repudiation by petitioner, (May 27, 1958) the time for delivery scheduled in the original sale agreement had been postponed by mutual consent, and a new delivery date had not yet been agreed upon. Petitioner advanced various views as to the measure of McJunkin's damage, but in the Court of Appeals finally settled upon the contention that the 5 per cent figure should be applied to the pipe delivered to it (by other suppliers) prior to January 1, 1959, and 3 per cent to the pipe delivered after that date. McJunkin had no voice in determining the time when petitioner actually took deliveries from other sellers after the breach. Moreover, as the Court of Appeals pointed out, the delay in deliveries until after January 1, 1959, was due to the time involved in advertising for new suppliers and in processing new purchase contracts with them. (Opinion 18a.) For these and other reasons stated

in the opinion of the Court of Appeals, the evidence of a change from a discount of 5 per cent to a commission of 3 per cent was wholly irrelevant.

Under these circumstances the Court of Appeals correctly said: "There is not sufficient evidence to support a finding of a 3 per cent commission *under any rule of damages.*" (Italics herein supplied unless otherwise stated.) The Court therefore further said:

> "Since we decided this question of amount of discount on the basis of insufficiency of evidence, it is not necessary to decide what measure of damages rule is applicable, or whether the law of North Carolina or West Virginia applies."

Moreover, in cases like the present, that is, cases involving repudiation of a purchase contract at a time when the date of performance has not been fixed, the highest courts of both West Virginia and North Carolina specifically approve and follow the rule, from which there appears to be no dissent in any jurisdiction, that damages will be determined as of the date of the breach.[1] *E. g. 46 Am. Jur. "Sales"* Sec. 618; *Uniform Sales Act*, Sec. 64(3).

In *Wood & Brooks Lumber Co.* v. *Hewit Lumber Co.*, 89 W. Va. 254, 265, 109 S. E. 242, 19 A.L.R. 467, the Supreme Court of Appeals of West Virginia said:

> "The general statement of the law in regard to damages in cases of this character, as recently set forth by this court, is as follows: 'For breach of contract for the sale of personalty, by non-delivery of the property, the measure of damages ordinarily is the difference between the contract price and the market value of the articles at the time and place specified for delivery.' *Wilson* v. *Wiggin*, 77 W. Va. 1, 87 S. E. 92; and where no specific time is

[1] The Court of Appeals was fully informed of the supporting authorities, including the North Carolina decisions, which petitioner now says should be controlling.

> fixed for delivery the market value will be estimated as of the time of the refusal to deliver. Sutherland, Damages (4th Ed.) Sec. 651; 5 Elliot, Contracts, Sec. 5108; *Guice* v. *Crenshaw*, 60 Tex. 344; *Summers* v. *Hibbard*, 153 Ill. 102, 111, 46 A.S.R. 872; and the same rule applies where delivery is postponed from time to time, Sedgwick, Damages (9th Ed.) Sec. 737; *Roberts* v. *Benjamin*, 124 U. S. 64."

Similarly, in *McCall* v. *Gloucester Lumber Co.*, 196 N. C. 597, 146 S. E. 579, the North Carolina court used the following language:

> "The contract fixed no time for performance or price as to the merchantable saw timber and the price of the acid wood and tan bark was subject, under the contract, to *fluctuation*. The standard of adjustment is the fair market value at the time of the breach. The railroad was fixed in the contract as the place of delivery. The measure of damages is the difference between the fair market value of the wood product delivered according to the terms of the contract and the fair market value of the property in its then condition at the time of the breach."

Accord: *Bryant* v. *Southern Box & Lumber Co.*, 192 N. C. 607, 135 S. E. 531.

None of the authorities cited by petitioner (p. 12) are opposed to the foregoing,[2] and it is believed that no contrary decision will be found in North Carolina, West Virginia or elsewhere.

The petition therefore falls far short of compliance with the requirement of Rule 19 of this Court, indicating the

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[2] McJunkin Corporation has never contested and the Court of Appeals specifically recognized (Opinion p. 13a) the authorities cited by petitioner which support the rule that *where parties to a purchase contract have fixed the date of performance*, damages for breach will be determined as of that date.

character of the reasons to be considered on application for certiorari:

> "(b) Where a court of appeals has * * * decided an important state or territorial question in a way in conflict with applicable state or territorial law."

## ANSWER TO POINT II OF THE PETITION

The second point in the petition is a charge that in directing the verdict the Court declined to view the evidence in the light most favorable to petitioner, and that by "formulating its own rules" and "making no mention" of the North Carolina law it deprived petitioner of a jury trial.

In amplification of this contention petitioner speaks of "highly contested issues of fact," evidence of "different inferences and conclusions," and the impropriety of a directed verdict in favor of the party having the burden of proving such "determinative issues."

As aptly found by the Court of Appeals, the basic answers to these contentions are:

**(1) Petitioner had agreed to purchase pipe from the plaintiff under an unambiguous, complete and admittedly genuine written contract. The interpretation of such a contract and the measurement of petitioner's responsibility thereunder being for the court not a jury to determine, the direction of the verdict was not an improper denial of the right to trial by jury under any state or federal law; and**

**(2) Tested either by federal or state law, the so-called "issues of fact" and "inferences and conclusions" suggested in the petition involved matters inadmissible and irrelevant to the interpretation and enforcement of the written contract sued on; and**

**(3) Independently of and in addition to (1) and (2), the question of directing a verdict in a federal court is one**

**of federal not state procedure, and the Court is not governed by any state law or state court decision with respect thereto.**

It is the settled rule of the federal, as well as that of most state, courts[1] that in cases where the facts overwhelmingly and unerringly point to but one maintainable result, a directed verdict is not an invasion either of the province of the jury or the fundamental rights of the litigant.

In its brief in the Court of Appeals petitioner conceded this principle as follows:

> "While under proper circumstances a federal judge may, under Rule 50, direct a verdict in favor of the party having the burden of proof, the test of the propriety of such action is different from that when the party not having the burden makes the motion. To meet the test of propriety in directing verdict in favor of the party having the burden a judge must be able to say correctly not only that there was sufficient evidence to support a verdict as directed, but that there was insufficient evidence for permitting any different verdict."

There is no need, however, to encumber the present case with excursions into the general field suggested by the authorities.

The determinative factor in this action is that the plaintiff's case rested upon a clear and complete set of written documents, the genuineness of which was stipulated at the inception of the trial. The controlling, and only real, issue was whether the writings so relied upon constituted a contract binding upon the parties.

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[1] This includes the right to direct a verdict for the plaintiff as well as the defendant. *Davis Frozen Foods, Inc.* v. *Norfolk & Southern R. Co.* (C.A.-4, 1953) 204 F. (2d) 839; *Leach* v. *Burr*, 188 U. S. 510, 47 L. Ed. 567; *Union Pac. R. C.* v. *McDonald*, 152 U. S. 262, 38 L. Ed. 434; *Delaware etc. R. Co.* v. *Converse*, 139 U. S. 469, 35 L. Ed. 213; *Booker* v. *Coal Corp.*, 90 W. Va. 652, 112 S. E. 237; and cases cited and quoted *Wigmore, On Evidence* (3d. ed.) Sec. 2495(b).

On this point the Court of Appeals, as did the District Court, found that the purchase order and other written documents created "a binding and subsisting contract between the parties, not ambiguous, conditional or indefinite in any manner, and binding on the defendant to purchase and the plaintiff to furnish" the pipe contracted for. (Opinion 5a-6a.)

The factors which controlled this determination, namely, the interpretation of the writings involved, and the consequences which flow therefrom were for the court, not for the jury, to consider and pass upon. This, it is believed, is not only the rule in North Carolina and West Virginia but in all jurisdictions, state and federal.[1] The so-called factual inferences and other parol matters on which it is contended the plaintiff carried the burden of proof and which petitioner insists should therefore have been submitted to the jury were either contradictory of the plain and unambiguous writings or entirely irrelevant thereto. (Opinion 10a-11a.)[2]

Moreover, Mr. Kyle, the executive of petitioner who had complete charge of the transaction, put the real "decisive determination," beyond the realm of dispute when he testified:

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[1] "Where language of a contract is free from ambiguity, the ascertainment of its meaning and effect is for the court, and not for the jury." *Young v. Southern Mica Co.*, 237 N. C. 644, 75 S. E. (2d) 795. "The construction of an unambiguous written agreement, or a series of such agreements read together, is a matter of law for the court; and oral testimony of parties thereto, or others, as to what was intended thereby, will not be considered." *Coleridge v. Central Nat'l Bank*, 125 W. Va. 760, 25 S. E. (2d) 900. Many similar federal and state cases cited in Decennial Digest "*Contracts*," Key No. 176, including *Robbins v. Myers Trading Post*, 253 N. C. 474, 117 S. E. (2d) 438.

[2] For example, the supposed (but unproven) "contemplation" of the parties that the contract was not to be considered binding until petitioner's financing was "secure," as well as the alleged (also unproven) trade usages and customs, which were in clear opposition to the plain written commitments of the parties, and as such wholly inadmissible. *Hartmann v. Hotel Co.*, 136 W. Va. 681, 68 S. E. (2d) 34.

"Q. When you received the letter from Mr. Wehrle of August 5, and from that time on, you knew that McJunkin Corporation had committed itself to furnish your company the pipe referred to in your letter of July 11, upon the terms of your letter of July 11?

"A. Yes."

This unqualified recognition of the binding effect of the purchase contract doubtless accounts in large measure for petitioner's attempt to becloud the case with the various unproven and inadmissible matters above indicated. These attempts have been most recently carried forward in the petition to this Court.

As to the fact of the breach, defendant's conduct was undenied and undeniable. On May 27, 1958, petitioner addressed McJunkin Corporation as follows:

"This letter will constitute cancellation of the line pipe ordered from you in our letter of July 11, 1957."

There was no suggestion then of "conditions," "understandings," "trade usages" or any of the other considerations subsequently conceived and urged; nor was there any intimation that petitioner was not bound by its purchase order. One does not cancel that which does not exist. The Court of Appeals pertinently concluded that petitioner elected summarily to "cancel" its whole commitment and risk the consequences.

The third and only remaining issue, the determination of the measure of plaintiff's damage, was inherently a matter for the Court not the jury to decide.

Since, as above developed, the law is settled in North Carolina, West Virginia and perhaps all other states, that the jury had no proper function to perform with respect to the interpretation or application of the written contract sued on, the contention that the Court found in favor of the

plaintiff on the basis of "its own rules," without reference to the law of North Carolina, has no tenable significance.

Moreover, upon principle and according to the majority of the federal courts, both before and since Rule 50 of the Rules of Civil Procedure, the matter of directing a verdict is generally considered to be procedural and is therefore controlled by federal practice rather than by substantive law of the states.

This principle, applied specifically to a directed verdict for the plaintiff, was dealt with in an opinion by Judge Parker as follows:

> "Defendant argues that verdict should not have been directed for plaintiff on this issue because the burden rested upon the plaintiff to establish defendant's negligence. This question was decided on the former appeal, where we said: 'The fact that the burden of this issue rested upon the plaintiff is immaterial; for the rule is well settled that the court, upon request should direct a verdict in favor of the party having the burden of proof if the evidence establishes the facts in his favor so clearly that reasonable men could entertain no doubt with regard thereto. (Citing cases.)' (195 F. 2d 605) Defendant argues that the state rule is to the contrary; but, that the question is one of federal and not of state practice, is too well settled to admit of argument, and this was true even in the days of the Conformity Act. See Nudd v. Burrows, 91 U. S. 426, 442, 23 L. Ed. 286; Capital Traction Co. v. Hof, 174 U. S. 1, 13-14, 19 S. Ct. 580, 43 L. Ed. 873; Herron v. Southern Pac. R. Co., 283 U. S. 91, 94, 51 S. Ct. 383, 75 L. Ed. 857."
>
> *Davis Frozen Foods, Inc.* v. *Norfolk & Southern Ry. Co.*, (C.A.-4, 1953) 204 F. (2d) 839; certiorari denied 346 U. S. 824, 74 S. Ct. 41, 98 L. Ed. 349.

Judge Parker's language above quoted states the holding in numerous prior and subsequent cases of the Fourth and other circuits.* Succinctly stated, the rule is that "the principle of *Erie R. Co.* v. *Tompkins* does not determine the division of functions between court and jury." *Diederich* v. *American News Co.*, cited below.

The reasoning behind the rule is declared in the opinion of Chief Justice Hughes in *Herron* v. *Southern Pacific R. Co.*, 283 U. S. 91, 75 L. Ed. 857. Holding that the laws of Arizona did not control the authority of a federal court in that state in directing a verdict, the opinion lays it down that

> "In a trial by jury in a Federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. As was said by Mr. Justice Story, in United States v. Battiste (C.C.) 2 Sumn. 240, 243, Fed. Cas. No. 14,545: 'It is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law, as it is laid down by the court'."
>
> *Idem. 283 U. S. at page 95.*

In stating its point, petitioner implies that by directing the verdict, the Court "deprived" it of a jury trial; that the action of the Court "reached the outer limits" of judicial power and "comes closest to infringement upon the Seventh Amendment's guarantee of jury trial rights in civil cases."

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*McSweeney v. Prudential Ins. Co. (C.C.A.-4, 1942) 128 F. (2d) 660, certiorari denied 317 U. S. 658; Ling v. Edenfield (C.A.-5, 1954) 211 F. (2d) 705; Allen v. Matson Navigation (C.A.-9, 1958) 255 F. (2d) 273; Diederich v. American News Co. (C.A.-10, 1942) 128 F. (2d) 144; Ettelson v. Metropolitan Life Ins. Co., (C.A.-3, 1943) 137 F. (2d) 62, certiorari denied 320 U. S. 778.

The reasons for these challenging but nevertheless indecisive expressions are manifest. The author could not say, and obviously knew that he could not say, that on this record the directed verdict was a violation of any right "preserved" to petitioner by the Seventh Amendment. There is much literature on the subject, including studies of the rights to a jury trial in civil cases at common law. But it is much too late to assert that the Constitution "preserves" to a litigant the right to demand a jury trial as to the intendment and effect of a clear and admittedly genuine written contract, or even in other cases where the evidence overwhelmingly points in but one direction.

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## CONCLUSION

It is rare that a litigant complains that an opinion, particularly an adverse opinion, is too long. More often the complaint is that the Court has failed plainly and fully to explain its ruling.

In this case the Court of Appeals, after writing one adequate opinion, extended to petitioner the opportunity of an additional hearing on the question of damages. Doubtless the actual grievance of petitioner is that the opinion clearly illuminates the fact that the real rights and equities involved in this lawsuit are far afield from the supposed deprivation of rights so vigorously pressed upon the Court in the petition.

The basic and undeniable facts are that at a time (early 1957) when pipe was in very short supply, petitioner, through a consulting engineer who had enjoyed favorable business relationships with McJunkin Corporation, succeeded in negotiating a binding commitment by that company to supply petitioner its complete requirements. The then president of petitioner and its consulting engineer considered that such a commitment by a supplier was needed to effect its financing arrangements. At that time, it was anticipated that petitioner's construction project

would "go forward rapidly," with work to start "in the fall of 1957." Consequently, the contract scheduled deliveries for the period November, 1957, through January, 1958.

Having exhausted its quota of pipe by its commitment to petitioner, McJunkin Corporation lost the opportunity to market the pipe to other purchasers.

Because of the unexpected delays in obtaining approval of its project plans and consequent delays in effecting its financing, petitioner was forced to ask for successive postponements in the delivery schedule. This was agreed to by McJunkin Corporation, with the result that after October, 1957, the date for such deliveries was indefinite.

On May 27, 1958, after pipe in all sizes had become readily available, petitioner, with no word of explanation, notified McJunkin of its cancellation of the contract. Subsequently, petitioner bought the pipe from other suppliers, including foreign mills, at reduced prices. With something less than complete candor, Mr. Kyle, vice-president of petitioner, testified that while the lower prices may have been "one of the motives," petitioner's "prime motive" was to "clear our books."

It was in this background that the Court of Appeals concluded that petitioner's conduct in cancelling the contract was a "calculated risk."

The McJunkin Corporation seeks by this action to recover only the profit contemplated by the parties by a clear and complete written contract. On the basis of that contract, and the arbitrary repudiation thereof by petitioner, an eminent trial judge of long and varied experience and the Court of Appeals affirmed the validity of the complainant's claim.

The case is of importance to the litigants only. The decision conflicts with no state or other Court of Appeals decision, and the petition presents no important question of federal law which requires settlement by this Court. Most

certainly the decision does not depart from the accepted and usual course of judicial proceedings. To the contrary, as carefully developed in the written opinion, the judgment rendered comports with the highest standards of procedure and concepts of justice.

It is respectfully submitted that the writ of certiorari therefore should be denied.

JOHN H. ANDERSON,
WILLIS SMITH, JR.,
Raleigh, North Carolina.
ARTHUR G. STONE,
DONALD O. BLAGG,
Charleston 25, West Virginia,
*Attorneys for Respondent.*

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